ITT Federal Services Corporation and Lockheed Martin Services, Inc. *and* Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO. Cases 24–CA–7658 and 24–CA–7659

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On April 19, 1999, Administrative Law Judge Leonard M. Wagman issued the attached decision. Respondent ITT Corp. filed exceptions, a supporting brief, and a reply brief. The Charging Party filed cross-exceptions, a supporting brief, a supplemental brief, and an answering brief.[1] Respondent Lockheed Martin Services, Inc. filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order only to the extent consistent with this Decision and Order. Chairman Hurtgen joins in this opinion, except as to Part V, from which he dissents.

I. BACKGROUND

The relevant facts are these. The Union represented 46 marine and ocean engineering (MOE) employees employed by Martin Marietta Service Corporation (Martin Marietta), one of ITT's predecessors, at its facilities at Roosevelt Roads, Ceiba, Puerto Rico. The parties had executed a collective-bargaining agreement on August 18, 1995, to expire on July 31, 1997.

In October 1996,[3] Respondent Lockheed Martin Services, Inc. (LMSI) and ITT learned that the United States Navy had selected ITT as the successful bidder on a contract to perform the ocean engineering work at the Roosevelt Roads Naval Base's Atlantic Fleet Weapons Training Facility, which the LMSI bargaining unit employees had previously performed. Following a phase-in period that began on or about October 28, ITT took over the operation from LMSI on December 1. On that date, LMSI provided a payroll list of its employees to ITT. The list contained the names of 272 employees, of whom approximately 45 were in the unit. On December 8, the Respondent changed the name of the bargaining unit from the MOE Department to the Surface Craft Department. The size of the unit was reduced to 28 employees, and, of the 272 employees on LMSI's payroll list, ITT began its operations at Roosevelt Roads with approximately 180.

The complaint allegations involve, inter alia, three employees—Richard Rhinehart, Peter Torrens, and Harry Wessel—who worked for LMSI and its predecessors and were, since the inception of the union movement in 1993, union activists.

II. ALLEGATIONS REGARDING LMSI'S BLACKLISTING RHINEHART, TORRENS, AND WESSEL, AND CAUSING OR ATTEMPTING TO CAUSE ITT TO DISCRIMINATE AGAINST RHINEHART, TORRENS, AND WESSEL BY FAILING OR REFUSING TO HIRE THEM

We agree with the judge that LMSI did not violate the Act by blacklisting Rhinehart, Torrens, and Wessel, or by causing or attempting to cause ITT to fail and refuse

[1] The Charging Party contends, in its answering brief, that the Board should dismiss Respondent ITT's exceptions 3, 4, 8, 9, 10, 22, and 23 because they do not conform to the Board's Rules and Regulations. Specifically, the Charging Party contends that these exceptions are not discussed in Respondent ITT's brief and should, therefore, be dismissed. We deny the Charging Party's request because Respondent ITT's exceptions are in substantial compliance with Sec. 102.46 of the Board's Rules and Regulations.

The Charging Party has requested that we take administrative notice of employee Candelario's posthearing termination, as allegedly established by "annex 1" and "annex 2," which are attached to its answering brief. "Annex 1" and "annex 2," both of which postdate the hearing, are two union documents regarding a grievance filed on behalf of Candelario. We deny this request. Although the Charging Party did not cite Fed.R.Evid. 201 as a basis for its request, it has failed to show that these documents are susceptible to notice under this Rule or otherwise. Fed. R. Evid. 201(b) states:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

The proffered documents, which, as stated above, concern an event that occurred after the hearing, are not susceptible to administrative notice under either category of Fed.R.Evid. 201(b). See, e.g., *Dahl Fish Co*., 279 NLRB 1084, 1109 (1986), enfd. mem. 813 F.2d 1254 (D.C. Cir. 1987).

In any event, insofar as the Charging Party's request for administrative notice is related to the 8(a)(1) allegation involving Candelario, we have adopted the judge's finding that ITT unlawfully threatened Candelario with unspecified reprisals for supporting the Union.

[2] Respondent ITT Corp. and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] All dates will refer to 1996 unless otherwise indicated.

to hire these individuals as alleged in the complaint. The judge found that the record did not show any effort by LMSI to provide any information to ITT regarding these individuals' union sentiments and activities. Also, the payroll list prepared by LMSI officials (and delivered to ITT officials) during the transition period had no information about these individuals' Union sentiments and activities. Finally, there was no showing that David Graham, ITT's hiring official (or any other ITT recruiter), ever received any information from LMSI regarding applicants' union activities or sentiments.

III. NOVEMBER 1996 REFUSAL TO CONSIDER AND REFUSAL TO HIRE ALEGATIONS

We agree with the judge's findings that ITT did not refuse to consider or refuse to hire Torrens, Rhinehart, and Wessel in November 1996. The judge found that Graham, ITT's hiring official, had no knowledge of the union activities of Torrens, Rhinehart, or Wessel, and there was no showing that Graham ever saw these individuals' names in November, because they did not submit applications, and Graham relied exclusively on applications.[4]

IV. FEBRUARY 1997 REFUSAL TO CONSIDER AND REFUSAL TO HIRE ALLEGATIONS

A. ITT's Alleged Failure and Refusal to Consider or Hire Wessel in February 1997

We agree with the judge's finding that ITT did not unlawfully fail and refuse to consider or hire Wessel on or about February 10, 1997. The judge found that there was no showing that the Union referred Wessel for a position at ITT after December 1. Nor was there any showing that Wessel made any effort to find employment at ITT's Roosevelt Roads operations.

B. ITT's Alleged Failure and Refusal to Consider and Hire Torrens and Rhinehart in February 1997

We find, contrary to the judge, that ITT did not violate Section 8(a)(3) of the Act by refusing to hire Torrens and Rhinehart in February 1997.[5]

The relevant facts are these. Torrens and Rhinehart were both longtime employees of LMSI and its predecessors. They were also union activists throughout the course of their employment. Torrens, an unlicensed engineer, became an alternate delegate in 1993 or 1994. In the main delegate's absence, he attended meetings, filed grievances, and otherwise represented unit employees. In August 1995, he served as an active member of the Union's negotiating committee. After LMSI discharged Rhinehart on June 21, Torrens became the main delegate for the unit. Torrens was laid off on November 30.

Rhinehart served as a second officer on the *Hugo*. As stated above, he served as the main delegate for unit employees until he was discharged. As main delegate, he presented grievances to LMSI and filed unfair labor practice charges against his employer. LMSI discharged Rhinehart on June 21 for an incident relating to his time and expenses report for work performed on June 11. Stated briefly, LMSI had, on at least three occasions, directed Rhinehart to change the number of hours he had entered on the top part of his report. Rhinehart refused each time. On June 17, Rhinehart filed a grievance on behalf of himself and six other employees, alleging that LMSI was wrongfully refusing to pay them for the appropriate number of hours.[6] On June 21, Human Resources Manager Jose Morales insisted that Rhinehart change his report. Rhinehart refused. Morales asked Rhinehart if he understood that if he refused to change the report, he would be discharged. Rhinehart said that he understood this, and Morales fired him. Minerva Donato, a human resources official, helped prepare Rhinehart's discharge paperwork. Rhinehart's discharge was not alleged as an unfair labor practice.

In January 1997, ITT, which had, as stated above, taken over operations from LMSI on December 1, began to seek referrals from the Union to fill positions in the Surface Craft Department. On January 14, 1997, Steve Ruiz and Jose Morrero, representing the Union, met with ITT's Surface Craft Department Manager Richard Cabral and hiring official Lisa Ramsey to discuss why ITT was not hiring former LMSI employees (including Rhinehart, Torrens, and Wessel). Ruiz and Morrero asked if ITT would hire Rhinehart. Cabral stated that he had no problem hiring Rhinehart, who, he said, was a good boat handler. Regarding Torrens, Cabral stated that he had a problem with Torrens because of his excessive absences from work. Ruiz asked how Cabral knew about these alleged absences; Cabral replied that he had previously worked with Torrens. (Presumably, Cabral meant that he had worked with Torrens while both were employed by GE, one of LMSI's predecessors.)

Later that month, the Union invited Torrens to come to its hall to fill out an application for a position at ITT's Roosevelt Roads operation. Torrens complied with this request, and, sometime before February 6, the Union directed him to report to the main gate at Roosevelt

[4] The judge's analysis of these allegations comports with *FES*, 331 NLRB No. 20 (2000). See discussion of *FES*, infra. Specifically, as stated above, Graham had no knowledge of the union activities or sentiments of Torrens, Rhinehart, and Wessel.

[5] The judge did not independently pass on the refusal-to-consider allegations. We find no merit in these allegations. See fn. 9, infra.

[6] The grievance was pending at the time of the hearing. The dispute allegedly dealt with the computation of overtime, a subject covered by the collective-bargaining agreement.

Roads, where Donato, ITT's human resources administrator, would meet him. Torrens reported as instructed, and Cabral interviewed him. After the interview, Torrens never heard from ITT again. On February 6, Donato sent an employment requisition to the Union announcing an opening for an unlicensed engineer position. (Torrens had worked as an unlicensed engineer for LMSI.)

That same month, Ruiz advised Rhinehart that ITT was hiring for Rhinehart's second mate position. Ruiz instructed Rhinehart to complete an application for employment with ITT as a second mate. Rhinehart complied with these instructions. On February 10, 1997, Rhinehart and several other applicants, including Torrens, reported to the gate at Roosevelt Roads. Cabral interviewed Rhinehart. Cabral stated that he knew where Rhinehart had worked last, how long he had worked there, and why he had left. Cabral asked Rhinehart what he had liked about his last job; Rhinehart replied that he had liked the men he had worked with. Cabral also asked him what he did not like about his last job; Rhinehart replied that he did not like the way management had lied to the employees and cheated them out of their pay. Cabral asked Rhinehart what he would do if things had not changed. Rhinehart answered that he wanted to work and get paid, and that he would get along with his fellow employees, as he had in the past. Rhinehart asked Cabral what positions were open; Cabral stated that there were two deck positions, engine positions, and two mate positions. Rhinehart did not hear from ITT after this interview.

Later that month, Ruiz invited Rhinehart to sit with the Union during contract negotiations with ITT. On February 26, 1997, Rhinehart sat with Ruiz and Morrero at the bargaining table. ITT's negotiators were Employee Relations Manager John Bligh, Ramsey, Donato, and Cabral. When the union group entered, Bligh objected to Rhinehart's presence on the grounds that Rhinehart was no longer a unit employee. Bligh waved his finger close to Rhinehart's face, asked what he was doing there, and threatened to pull out of the negotiations. Ultimately, Bligh withdrew his objection, and negotiations proceeded peacefully.

The next day, Ruiz asked Cabral about getting Rhinehart a second mate's job. Cabral answered that he did not "get a warm fuzzy feeling" from Rhinehart. Ruiz asked Cabral to elaborate, but Cabral would only state that, "[r]ight now, that is the only answer that I am going to give you, because Richard [Rhinehart] is sitting there."

The Union filed a grievance regarding Rhinehart, alleging that ITT was discriminating against him. Ruiz also asked ITT for an explanation regarding its treatment of Rhinehart. Sometime after December 1, 1996, ITT hired a second mate in the mainland United States, without going through the Union or offering the job to Rhinehart.

The judge, applying a *Wright Line*[7] analysis, found that ITT unlawfully refused to hire Torrens and Rhinehart. We disagree, and reverse the judge's findings.

In *Wright Line*, supra, the Board set forth a test of causation for all cases alleging violations of Section 8(a)(3), or violations of Section 8(a)(1) turning on employer motivation: To establish that an employer unlawfully discharged an alleged discriminatee, the General Counsel must show, by a preponderance of the evidence, that the protected activity was a motivating factor in the employer's decision to discharge that employee; once the General Counsel has made this required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.[8]

Regarding the instant case, *Wright Line* establishes the analytical framework for resolving alleged 8(a)(3) violations raised by refusal-to-hire allegations. Based on the *Wright Line* burdens of proof, the recent decision in *FES*, supra, sets forth the specific criteria that the General Counsel has to meet to demonstrate a prima facie case of a refusal-to-hire violation:

> To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

FES, supra, slip op. at 4.[9] [Footnotes omitted.]

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983), overruled in part on other grounds, *Director, Office of Workers Compensation Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 276–278 (1994).

[8] *Wright Line*, supra at 1089.

[9] The General Counsel also alleged that ITT refused to consider Torrens and Rhinehart for employment on or about February 10, 1997. Under *FES*, supra, slip op. at 7:

As to the first prong of the above-stated test, the Respondent was hiring at the time Rhinehart and Torrens applied for jobs with ITT in February 1997. In January, ITT began to seek referrals from the Union to fill unit positions. In February, ITT sent an employment requisition for an unlicensed engineer position to the Union. (Torrens had worked as an unlicensed engineer.) Additionally, ITT hired a second mate from the mainland United States.

As to the second prong, the judge correctly found that Torrens and Rhinehart were amply qualified for unit work. Torrens had worked for LMSI and its predecessors for 17 years (including work as an unlicensed engineer), and LMSI and its predecessors had employed Rhinehart (who was the second mate on the *Hugo*) for almost 18 years. Furthermore, Cabral stated that Torrens was a good boat handler.[10]

Regarding the third prong, we find, contrary to the judge, that there is insufficient proof that antiunion animus contributed to ITT's refusal to hire Torrens and Rhinehart in February 1997. Although the judge correctly found that ITT was aware of Torrens' and Rhinehart's history of union activism under ITT's predecessors, he erred in concluding that LMSI's alleged hostility toward union activists resurfaced under ITT.[11]

The judge based his finding that antiunion animus contributed to ITT's refusal to hire Torrens and Rhinehart on the following incidents: (1) Bligh's hostility toward Rhinehart when Rhinehart arrived to participate in contract negotiations with ITT; (2) Cabral's statement to Ruiz that he did not get a "warm fuzzy feeling" from Rhinehart; (3) an independent violation of Section 8(a)(1) committed by Cabral approximately 3 months after the alleged unlawful refusals to hire; and (4) ITT's resort to the mainland United States to fill a second mate's position.

Contrary to the judge, these findings fall far short of demonstrating that antiunion animus contributed to ITT's refusal to hire Torrens and Rhinehart.

Bligh's behavior toward Rhinehart on February 26, 1997 does not demonstrate his—let alone ITT's—antiunion animus. As stated above, Bligh challenged Rhinehart's right to sit with Ruiz and Morrero at the negotiating table because Rhinehart was no longer a unit employee. Bligh waved his finger close to Rhinehart's face, asked what he was doing there, and threatened to pull out of the negotiations. The evidence, however, does not establish that this behavior, although perhaps "hostile" or rude, was motivated by *antiunion* hostility. To the contrary, Bligh's challenge to Rhinehart's presence at the negotiating table could well have been motivated by his concern that Rhinehart was not a unit employee. In any event, after Ruiz explained that the Union wanted Rhinehart at the negotiating table because of his expertise on the contract project, *Bligh withdrew his objection and negotiations proceeded peacefully*.

As stated above, on the day after this incident, Ruiz raised the possibility of ITT hiring Rhinehart with Cabral. Cabral replied that he did not "get a warm fuzzy feeling" from Rhinehart. Ruiz pressed Cabral for a further explanation, but Cabral would only say that, "[r]ight now, that is the only answer that I am going to give you, because Richard [Rhinehart] is sitting there." The judge included Cabral's "warm fuzzy" remark in his discussion of ITT's alleged demonstration of antiunion animus, but he did not explain why this colloquialism evidenced antiunion animus. We find that Cabral's remark is hopelessly vague and that a link to Rhinehart's history of un-

> [t]o establish a discriminatory refusal to consider, pursuant to *Wright Line* . . . the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

As discussed below, we reverse the judge's finding that ITT's antiunion animus contributed to its decision not to hire Torrens and Rhinehart in February 1997. In light of this reversal, we also find that antiunion animus did not contribute to ITT's alleged refusal to consider Torrens and Rhinehart for employment in February 1997. Further, under the above-quoted test for a refusal-to-consider allegation, we find that ITT did not exclude Torrens and Rhinehart—both of whom were interviewed by Cabral—from the hiring process.

[10] The judge also found that Cabral and ITT did not raise the issue of Torrens' and Rhinehart's qualifications for refusing to hire them.

[11] Regarding ITT's knowledge of Torrens' and Rhinehart's history of union activism, the judge essentially found that ITT managers Donato and Captain Franklin Woods had previously worked for LMSI and were aware of Torrens' and Rhinehart's roles as union activists. As stated above, Donato had helped prepare Rhinehart's discharge paperwork, having been terminated for refusing to change his time and expenses report. Rhinehart filed a grievance regarding ITT's computation of overtime. Donato was also, according to the judge, aware of a warning regarding excessive absences which was given to Torrens on February 1. (The warning was expunged by LMSI pursuant to a settlement agreement.) The judge specifically found that Woods brought his knowledge of and hostility toward Torrens' union activities with him based on the fact that Woods had ordered Torrens off the *Hugo* when Torrens appeared to distribute layoff papers. In response to a grievance filed regarding this incident, ITT advised Torrens that Woods had been counseled regarding his use of profanity toward Torrens. The judge's decision does not describe any other incidents in which Woods observed Torrens or Rhinehart engaging in union activities.

Additionally, the judge found that Cabral had an opportunity to learn about Torrens' and Rhinehart's union activities at LMSI from an LMSI manager.

Chairman Hurtgen does not pass on whether the General Counsel has established the element of knowledge.

ion activism while he was employed at LMSI has not been shown.

The judge further found ITT demonstrated its antiunion animus because it hired (sometime after December 1, 1996) a second mate in the mainland United States for work at Roosevelt Roads without going through the Union or offering the job to Rhinehart. The judge did not explain why this behavior constituted antiunion animus. Presumably, the judge believed that this was evidence of ITT's antiunion animus because ITT had gone to such tremendous lengths (i.e., resorting to the faraway mainland United States) merely to avoid hiring Rhinehart. Based on this record, such a finding would be speculative. In sum, nothing in this record suggests that ITT's "resort" to the mainland United States was motivated by its desire to avoid hiring Rhinehart because of his union activities or sentiments, or to avoid hiring through the Union.

The judge's final finding regarding ITT's alleged antiunion animus rests on an independent 8(a)(1) violation committed by Cabral on May 1, 1997, which was more than 2 months after ITT allegedly unlawfully refused to hire Torrens and Rhinehart.[12] The violation was a threat of unspecified reprisals made by Cabral to Roberto Candelario, an employee. This violation, standing alone—as it must in light of our reversal of the judge's other findings regarding ITT's alleged antiunion animus toward Torrens and Rhinehart—is an insufficient basis for finding that ITT's antiunion animus contributed to its refusal to hire Torrens and Rhinehart. The violation was an isolated one, and is not indicative of any overall pattern of antiunion conduct by ITT, who, as stated above, had entered into contract negotiations with the Union and was not found to have otherwise violated the Act in this proceeding.[13]

In sum, the judge based his finding of antiunion animus on the three incidents described above plus an independent 8(a)(1) violation. As we have discussed, the judge's finding of antiunion animus based on the three incidents is insufficiently supported by the evidence. And, the independent 8(a)(1) threat of unlawful reprisals is an insufficient basis for finding that antiunion animus contributed to ITT's decision not to hire Torrens and Rhinehart. For these reasons, we reverse the judge, and find that the General Counsel has failed to establish that antiunion animus contributed to ITT's decision not to hire Torrens and Rhinehart in February 1997.

[12] See sec.V. infra.

[13] Indeed, ITT had not made any effort to avoid recognizing or bargaining with the Union. ITT was negotiating with the Union, and sought employment referrals through the Union.

V. THREAT OF UNSPECIFIED REPRISALS

Contrary to our dissenting colleague, we agree with the judge that ITT violated Section 8(a)(1) by making a threat of unspecified reprisals for engaging in union activity to employee Roberto Candelario.

On May 1, 1997, Candelario reported for work at 7:30 a.m. He intended to help the Union with its contract negotiations with ITT, which were scheduled for 10 a.m. Sometime that morning, Surface Craft Department Manager Cabral approached the USNS *Hunter*, which was docked at Roosevelt Roads Naval Station. Candelario was standing on deck. Cabral called out to Candelario, and invited him to join him. Candelario left the *Hunter* and entered an ITT vehicle which Cabral was driving. As Cabral began driving, he stated that they were going outside the gate to check up on some signs and decals posted beyond the naval station. As they drove, Cabral explained to Candelario that he wanted to check the signs and decals to make sure that they were not on Navy property. Cabral and Candelario passed union signs and decals which read "ITT unfair labor practice" or exhibited the name ITT and dollar sign figures. When they turned back toward the base, Cabral stated that "whoever's doing this better watch out."

The judge found that Cabral's statement to Candelario, a union activist, was a thinly veiled warning that he or any other unit employee who might openly support the Union's bargaining effort by expressing opposition to ITT's labor relations policies would suffer discipline—including discharge—at ITT's hand. The judge further found that, through this remark, Cabral sought to interfere with, restrain, and coerce Candelario in the exercise of his Section 7 rights.

The Board's well-established test for interference, restraint, and coercion under Section 8(a)(1) is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Thus, the critical question here is whether Cabral's statement may reasonably be understood as unlawful under Section 8(a)(1). We agree with the judge that it may.

Essentially, our colleague argues that Cabral's statement to Candelario was ambiguous (i.e., his statement could reasonably have been interpreted as referring to his concern with the placement of signs and decals outside Navy property) and hence not violative of the Act. In this regard, our colleague contends that the General Counsel has not established a basis for finding that Cabral was concerned with the content of the signs as opposed to their placement. However, contrary to our

colleague's contention, the General Counsel does not have the evidentiary burden of divining Cabral's personal motivation for making the statement.[14] The General Counsel's burden is to demonstrate, by a preponderance of the evidence, that Cabral's comment could reasonably be construed as violative of Section 8(a)(1).

The General Counsel has met his burden. As stated above, Cabral sought out Candelario, a union activist, and invited Candelario to drive with him in a company car to observe signs and decals outside the naval station. As they drove, Cabral and Candelario passed union signs and decals which declared "ITT unfair labor practice" or displayed the ITT name next to dollar signs. When they turned back to head toward the base, Cabral told Candelario that "whover's doing this better watch out." The "this" part of his statement, reasonably construed, referred to the protected activity of posting union signs which expressed opposition to ITT's labor policies. The "better watch out" part of the statement, reasonably construed, referred to potential reprisals ITT would take against employees who opposed ITT's labor policies and supported the Union.[15] Even *if* Cabral's motivation was to express his concern about the placement of the signs and decals, the remark would still be unlawful because the statement itself does not express that thought, and Cabral ran the risk that his statement—or any ambiguity in his statement—could be construed by an employee as containing an unlawful threat. Thus, as the judge found, Cabral's statement violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified and set forth in full below, and orders that the Respondent, ITT Federal Services Corp., Roosevelt Roads, Ceiba, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals because they engage in activities on behalf of Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Roosevelt Roads, Puerto Rico facility copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by ITT's authorized representative, shall be posted by ITT and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by ITT to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, ITT has gone out of business or closed the facility involved in these proceedings, ITT shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by ITT at Roosevelt Roads, Puerto Rico at any time since May 1, 1997.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that ITT has taken to comply.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part.

Unlike my colleagues, I do not find that the Respondent violated Section 8(a)(1) of the Act by threatening an employee with unspecified reprisals for engaging in union activity.

The incident involved Richard Cabral, an ITT manager, and employee Roberto Candelario. They were in an ITT vehicle which Cabral was driving. Cabral told Candelario that they were going outside the gate to check on some signs and decals posted beyond the naval sta-

[14] "It is well settled that the test of interference, restraint, and coercion under Sec. 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Freightways Co*., supra, at 147.

[15] The very words "better watch out" have previously been construed as conveying a threat in violation of Sec.8(a)(1). See, e.g., *Southern Devices, Inc.*, 173 NLRB 1436, 1437 (1968).

[16] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tion, to make sure they were not on Navy property. They passed union signs and decals that said "ITT unfair labor practice" or had ITT and dollar signs printed on them. When they turned back toward the base, Cabral said that "Whoever's doing this better watch out."

The judge found that Cabral's statement was a thinly veiled warning that Candelario or any other unit employee who might openly support the Union's bargaining efforts by expressing opposition to ITT's labor relations policies would suffer discipline, including discharge. He found the comment violative of Section 8(a)(1) of the Act. My colleagues agree. I do not.

In my view, this finding represents a marked overreading of Cabral's statement. At a minimum, the inference of possible discharge is utterly baseless. Further, it is far from clear that Cabral was threatening to do anything with respect to Section 7 activity. It is at least as likely that Cabral was merely indicating that whoever was responsible for the signs and decals needed to be careful about where he put them (i.e., not on Navy property). The General Counsel has not established a basis for finding that it was the content of the decals, not their location, that concerned Cabral. To the contrary, given the fact that the mission of the two men concerned *where* the signs and decals were posted, the reasonable interpretation is that the persons doing the posting should "watch out" as to where they placed the decals. In these circumstances, the General Counsel has not shown that Candelario reasonably would have interpreted Cabral's statement as a coercive threat concerning Section 7 activity. Thus, contrary to my colleague's suggestion, my position does not hinge on divining Cabral's motivation. In sum, I find that the General Counsel has not met his burden of establishing that Cabral's statement was unlawful. I would therefore dismiss this allegation as well.[1]

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen , Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with unspecified reprisals because they engage in activities on behalf of Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

ITT FEDERAL SERVICES CORPORATION

Virginia Milan-Giol and *Efrain Rivera-Vega, Esqs*., for the General Counsel.
James G. Baker, Esq. (Spencer, Fane, Britt & Brown), of Kansas City, Missouri, and *Francisco Chevere* and *Luis R. Amaddeo, Esqs. (McConnel Valdes),* of San Juan, Puerto Rico, for Respondent ITT Federal Services Corporation.
Victor M. Comolli, Esq. (Shuster Usera Aguilo & Santiago), of San Juan, Puerto Rico, and *Andrew L. Tomlinson, Esq.,* of Cherry Hill, New Jersey, for the Respondent Lockheed Martin Services, Inc.
Ginoris Vizcarra de Lopez-Lay, Esq., of Santurce, Puerto Rico, for the Charging Party.

DECISION

STATEMENT OF THE CASES

LEONARD M. WAGMAN, Administrative Law Judge. These cases[1] were tried in San Juan, Puerto Rico, on March 31, April 1, 2, 28 and 30, 1998.[2] Upon a charge filed by Seafarers International Union, Atlantic, Gulf, Lakes and Inland District, a/w Seafarers International Union of North America, AFL–CIO (SIU), against Martin Marietta Government Services (LMSI),[3] in Case 24–CA–7303, and a charge filed by Harry Wessel, an

[1] Even if the Cabral statement was unlawful under Sec. 8(a)(1), it shows, at most, animus toward the decal posting, not animus against the union activity of Torrens and Rhinehart.

[1] The caption of these cases has been amended in accordance with a stipulation between the General Counsel and Respondent Lockheed Martin Services, Inc.

[2] All dates are in 1996 unless otherwise indicated.

[3] As a result of a merger, Martin Marietta Government Services has become Lockheed Martin Services, Inc., a wholly owned subsidiary of Lockheed Martin Corp.

Individual, against Lockheed Martin (LM), in Case 24–CA–7327, the Regional Director for Region 24 of the National Labor Relations Board (the Board), issued a consolidated complaint on May 30, 1997, alleging that LMSI and LM had violated Section 8(a)(5), (3), and (1) of the Act by unilaterally assigning supervisory duties to bargaining unit employees and issuing a warning to a bargaining unit employee for refusing to carry out those supervisory duties.

Upon further charges filed by SIU against LMSI, LM, and ITT Federal Services Corp. (ITT), in Cases 24–CA–7404, 24–CA–7658, and 24–CA–7659, the Regional Director for Region 24 issued a consolidated complaint on July 31, 1997, alleging that LMSI violated Section 8(a)(3) and (1) of the Act by blacklisting, or otherwise attempting to cause, or causing ITT to refuse to hire, employees Peter Torrens, Harry Wessel, and Richard Rhinehart because of their union activity. The same complaint alleged that ITT violated Section 8(a)(3) and (1) of the Act by refusing to consider and refusing to hire Torrens, Wessel, and Rhinehart on November 14 and again on February 12, 1997, because of their union activity. Also, this same consolidated complaint alleged that ITT violated Section 8(a)(5) and (1) of the Act by making unilateral changes in the bargaining unit employees' terms and conditions of employment and by refusing to meet with SIU and process grievances. Further, this complaint alleged that ITT violated Section 8(a)(1) of the Act, when a supervisor threatened an employee with unspecified reprisals for engaging in union activity or belonging to a union.

Further, upon the charges recited above, and charges filed by SIU against LM, LMSI, and ITT in Case 24–CA–7726, and against ITT in Cases 24–CA–7786, 7819, and 7875, the Regional Director issued a second consolidated amended complaint setting forth the alleged violations of the Act as stated above, and alleging additional unilateral changes in wages and other terms and conditions of employment as violations of Section 8(a)(5) and (1) off the Act.

On March 10, 1998, the Regional Director issued her Order Consolidating Cases covering Cases 24–CA–7303, 7327, 7404, 7658, 7659, 7704, 7726, 7786, 7819, and 7875. LMSI, LM, and ITT, respectively, filed timely answers to the complaints and their amendments.

At the outset of the hearing, the General Counsel announced that LMSI, LM, and SIU had joined in an informal settlement remedying the allegations in Cases 24–CA–7303, 7327, and 7404. Whereupon, I granted the General Counsel's motion to sever those cases from the consolidated complaint.

On April 30, 1998, upon the completion of the hearing in Cases 24–CA–7658 and 7659, I severed Cases 24–CA–7704, 7726, 7786, 7819, and 7875 from the consolidated complaint and postponed the hearing in these five cases indefinitely, pending the execution of a collective-bargaining agreement between SIU and ITT and their resolution of outstanding grievances. Thereafter, on December 2, 1998, upon the General Counsel's motion, I issued my Order Severing and Dismissing Cases upon advice that ITT had complied with its out-of-Board settlement agreement with SIU.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, LMSI, ITT, and SIU, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material to these cases, Respondent ITT, a corporation duly authorized to do business in the Commonwealth of Puerto Rico, has had an office and place of business at Roosevelt Roads, Ceiba, Puerto Rico, where it has been engaged in the government contracting of government defense services. During the 12-month period preceding January 30, 1997, ITT, in conducting its business operations purchased and received at its Roosevelt Roads, Puerto Rico facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. ITT admits, and I find, that ITT has been, at all times material to these cases, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all times material to these cases, Respondent LMSI, a wholly owned subsidiary corporation of LM, has been a Delaware corporation, with an office and place of business at Roosevelt Roads, Ceiba, Puerto Rico, where it engaged in the government contracting of government defense services up until November 30. During the 12-month period prior to November 30, LMSI, in conducting its business operations, purchased and received at its Roosevelt Roads, Puerto Rico facility goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. LMSI admits, and I find that LMSI has been, at all times material to these cases, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. LMSI and ITT admit, and I find, that at all times material to these cases, SIU has been a labor organization within the meaning Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

On June 15, 1993, the SIU filed a petition seeking a representation election in a unit of 46 marine and ocean engineering employees employed by LMSI's predecessor, Martin Marietta Services Corporation at its facilities at Roosevelt Roads, Ceiba, Puerto Rico. Thereafter, on August 24, 1994, following a Board-held election, the Regional Director for Region 24 issued a certification designating the SIU as the exclusive collective-bargaining representative of the following appropriate unit:

> *Included*: All employees employed by the Employer at its Marine Ocean Engineering facilities at Ceiba, Puerto Rico, including Facility Monitors, Marine Technicians B, Associate Maintenance Specialists, Industrial Maintenance Specialists B, Repair Technicians B, and Second Officers
>
> *Excluded*: All office clerical employees, the maintenance coordinator, the operations coordinator, the logistics coordinator, the stock assistant, the stock clerk, the typist clerk A, guards and supervisors as defined in the Act.

During the representation election, Martin Marietta's chief engineers and chief officers voted challenged ballots. Martin Marietta and SIU reached a collective-bargaining agreement on

August 18, 1995, without resolving the unit placement of either the chief engineers or the chief officers. This agreement became effective upon ratification by the unit employees on August 22, 1995. Its expiration date was July 31, 1997.

On October 13, 1995, the SIU filed a unit clarification petition with the Regional Director for Region 24, seeking clarification of the unit placement of the chief engineers and chief officers. Martin Marietta's position was that the chief engineers and chief officers were supervisors under the Act, and thus should be excluded from the bargaining unit. SIU urged a finding that these classifications were not supervisory and therefore should be included in the unit. On September 30, the Regional Director issued a decision finding that the chief engineers and chief officers were not statutory supervisors and were included in the bargaining unit.

In October LMSI and ITT learned that the U.S. Navy had selected ITT as the successful bidder on a service contract to perform government services at the Roosevelt Roads Naval Base's Atlantic Fleet Weapons Training Facility. ITT took over the operation from LMSI on December 1, following a phase-in period that began on or about October 28. On that date, LMSI provided a list of its employees to ITT. The list consisted of 272 employees, of whom approximately 45 were in the bargaining unit that SIU represented for the purpose of collective bargaining.

As of December 8, ITT changed the name of the bargaining unit from the Marine Ocean Engineering Department to the Surface Craft Department. Also as of the same date, ITT's payroll records show that it had reduced the bargaining unit to 28 employees. Of the 272 employees on LMSI's payroll list, ITT began its operations at Roosevelt Roads with approximately 180.

Among the LM employees who ITT did not hire in November, were SIU activists Peter Torrens, Harry Wessel, and Richard Rhinehart. Later, in February 1997, ITT asked SIU to refer additional employees for employment in the bargaining unit. However, ITT did not hire Torrens, Wessel, or Rhinehart in February 1997.

The issues presented in these cases are whether a preponderance of the record evidence Shows that Section 8(a)(3) and (1) of the Act[4] were violated by:

a. LMSI's blacklisting employees Torrens, Wessel, and Rhinehart or otherwise causing or at tempting to cause ITT to discriminate them by refusing to hire them because of their union activity.

b. ITT's refusal, on about November 14, to consider for employment, and its refusal on about the same date to employ Torren, Wessel, and Rhinehart, and by

c. ITT's refusal, on about February 12, 1997, to consider for employment, and its refusal to employ Torrens, Wessel, and Rhinehart.

These cases also present, as a further issue, whether ITT by Richard Cabral threatened an employee with an unspecified reprisal because its employees engaged in union activity.

B. Interference, Restraint, and Coercion

On the morning of May 1, 1997, Richard Cabral, Manager of the Surface Craft Department approached the USNS *Hunter*, which was docked at Roosevelt Roads Naval Station. He called out to employee Roberto Candelario, who was standing on deck, and invited Candelario to join him. Candelario had reported for work at 7:30 a.m. and intended to help the SIU in contract negotiations with ITT, scheduled for about 10 a.m. Candelario left the ship and climbed into a seat in an ITT vehicle driven by Cabral. As Cabral began driving, he stated that they were going outside the gate to check up on some signs and decals posted beyond the naval station.

Cabral drove through Gate No.1 to a place called "Don's Lighthouse." As they drove along, Cabral explained to Candelario that he, Cabral, wanted to check the signs and decals, to make sure they were not on Navy property. They passed SIU signs and decals which said " ITT unfair labor practice" or had ITT and dollar signs printed on them. When they turned back around toward the base, Cabral remarked that "whoever's doing this better watch out."[5]

The General Counsel contends that Cabral's remark to Candelario that "whoever's doing this better watch out" was a threat of reprisal against employees who engaged in union activity and therefore violated Section 8(a)(1) of the Act. I find that Cabral's remark to Candelario, a union activist, was a thinly veiled warning that he or any other bargaining unit employee, who might openly support SIU's bargaining effort by expressing opposition to ITT's labor relations policies would suffer discipline, including discharge at ITT's hand. I further find that by this remark, Cabral sought to interfere with, restrain, and coerce Candelario in the exercise of his right under Section 7 of the Act to support a labor organization. Accordingly, I find that by Cabral's veiled threat, ITT violated Section 8(a)(1) of the Act. *Leather Center,* 308 NLRB 16, 27 (1992).

C. The Alleged Discrimination

1. The transition

a. The facts

Peter Torrens worked for LMSI and its predecessors at the Roosevelt Roads Naval station from April 1979, until November 30. LMSI employed Torrens as an unlicensed engineer on

[4] Sec. 8(a)(1) of the Act provides:

It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Sec. 7 of the Act provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8(a)(3) of the Act provides in pertinent part:

It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

[5] My findings of fact regarding Candelario's encounter with Cabral on the morning of May 1, 1997, are based upon Candelario's undenied testimony.

a Navy surface craft, TRB-3. At the beginning of his employment at Roosevelt Roads, by RCA, which merged with General Electric, Torrens was a marine tech C. During the years leading up to his employment by LMSI, Torrens progressed to marine tech B, then marine tech A, and finally, under LMSI, to unlicensed engineer. LMSI's payroll record shows that his hourly wage, as of November 30, was $12.79.

During his employment by Martin Marietta and its successor, LMSI, Torrens actively supported SIU. He was one of the Marine and Ocean Engineering Department employees, who sought SIU as their collective-bargaining representative. In 1993 or 1994, soon after SIU began its organizing campaign among the MOE employees, Torrens became an alternate delegate.

As an alternate delegate, Torrens helped SIU's organizing campaign among the MOE employees. He attended an SIU meeting. Torrens received and distributed SIU pledge cards, T-shirts, hats, and pins. If the main SIU delegate was not present, Torrens attended meetings, filed grievances, and otherwise represented the MOE unit in matters involving Martin Marietta, LMSI, and, finally, LM. In August 1995, Torrens was an active member of the SIU's negotiating committee, dealing with Martin Marietta, after it had become a subsidiary of LM. When LMSI discharged SIU Delegate Richard Rhinehart, on June 21, Torrens became the main delegate for the MOE bargaining unit. In that capacity, he met with management regarding grievances and filed grievances.

On September 18, 1995, Torrens received a verbal warning from MOE Manager Alexander De Jesus for making a phone call to the SIU without notifying management or obtaining management approval of his intention to engage in union business during his worktime.[6] In his testimony in these proceedings, De Jesus admitted that while he was MOE manager, he would issue warnings to employees he observed doing union business during their worktime. In the warning issued to Torrens on September 18, 1995, De Jesus invoked section 4.05 of the collective-bargaining agreement, which required that Torrens ask his immediate supervisor's permission before leaving his work duties to engage in union business.

On January 23, January 24, February 8, February 12, and February 28, the Board's Region 24 conducted a hearing on SIU's petition to clarify the bargaining unit by determining the unit placement of chief officers and chief engineers. Torrens attended one of the January sessions. He did not testify at this hearing. On February 1, MOE Manager De Jesus issued a second disciplinary warning to Torrens for excessive absences. The warning asserted that between June and December 1995, Torrens had been present for duty on his assigned surface craft "only 37 percent of the time." According to Torrens, De Jesus included in his calculations, Torrens' attendance at the clarification hearing, the time Torrens spent in negotiations on behalf of SIU, his vacation, and sick days.

On April 3, SIU filed an unfair labor practice charge against Martin Marietta in Case 24–CA–7404, which alleged that the warning that De Jesus issued to Torrens on February 1 violated the Act. Thereafter, the Regional Director issued a consolidated complaint including allegations that by this warning, LMSI had violated Section 8(a)(1), (3), and (4) of the Act. Thus, the consolidated complaint alleged that by issuing this warning, LMSI had discriminated against Torrens because he supported SIU and because he had appeared at the clarification hearing in January. In the settlement agreement covering Cases 24–CA–7303, 7327, and 7404, referred to above at page 2, LMSI agreed to expunge from its records the warning issued to Torrens on February 1.

On September 3, employee Ricky Alvarez asked Torrens to represent him in a meeting regarding a fuel spill, with members of LMSI's management in the human resources office on the base. During the meeting, Torrens made a comment to Human Resources Manager Jose Morales about Alvarez. Morales answered that Torrens was there only to sit and take notes. Six days later, Torrens filed a written grievance complaining that Morales had thwarted Torrens' effort to act as an SIU delegate in processing Alvarez's grievance.

An incident involving Torrens on October 4 provoked him to file another grievance. On that day, De Jesus gave some layoff bumping forms to Torrens and asked him to distribute them to employees scheduled for layoff. De Jesus explained that the forms originated from the human resources office.

In the afternoon of the same day, Torrens boarded USNS *Hugo* to distribute forms to two bargaining unit employees who were aboard. He found the employees and they began filling out the forms. Soon, Captain Frank Woods came to Torrens and the two employees and announced: "Okay, break time is over. Now get the "f" off my boat."

Torrens explained to Captain Woods, a supervisor, that human resources had sent the forms to the two employees to fill out for the bumping layoff. Again, Woods ordered Torrens to: "Get the "f" off my boat." Torrens objected to what he viewed as disrespect. He retrieved the documents from the two employees and began to leave the vessel. Woods again ordered Torrens to: "Get the "f" off the boat."

Torrens quickly complained to MOE 's acting manager, B. J. Webb, who said he would investigate the incident. On October 7, SIU filed a grievance on Torrens' behalf complaining about Captain Woods' conduct and asserting that by that conduct, Woods had not allowed "the delegate to conduct union business." On October 28, Torrens found a reply to his grievance in his box in the shop. The reply, from Webb, dated October 11, stated that neither Webb, nor LMSI condoned the use of profanity and that Woods had been counseled "on this subject." Continuing, Webb reminded Torrens that union business should not interfere with "normal operations or work." Webb's reply also declared that: "Union business shall be conducted only during break times and approved break area (*sic)*."

On November 14, Torrens learned that if he wanted to work for ITT after it took over from LMSI, he should contact Lisa Ramsey, who was involved in the hiring for ITT, and see if his name was on the list. Ramsey's normal workstation was at ITT's Colorado Springs, Colorado headquarters, where she was the training manager. However, during the last 3 weeks of

[6] My findings regarding Torrens' verbal warning are based upon De Jesus' uncontradicted testimony and the warning that I received in evidence.

November, Ramsey was stationed in the Mark 30 Building at the Naval Station.

That same day, Torrens visited Ramsey, identified himself and asked if his name was on the list. Ramsey looked at a list and said that Torrens' name was not on it. He asked how that could be, as he had been with the company for 17 years and 7 months, was the SIU delegate and chief engineer for TRB-3. Ramsey replied that she was sorry but his name was not on the list.

Four days later, Torrens phoned Ramsey's office and told the woman, who answered, that he was Peter Torrens from MOE. She left the phone for about 1 minute, returned, and announced that he was not on the list. Torrens protested, asking how that could be, as he had been working there "so many years." Ramsey assured Torrens that if ITT had a future opening, it might offer it to him. Torrens asked if ITT planned to honor the collective-bargaining agreement. Ramsey answered: "Yes, just wages, not seniority." Torrens objected to Ramsey's answer. Ramsey said: "Well, that's the way it is." He asked: "Who am I speaking to?" She replied that it was Ms. Ramsey. Torrens asked to speak to ITT's project manager. Ramsey said he was not there, but she would leave a message for him to call Torrens. Torrens never received any call from ITT's project manager.

At the time in November, when ITT selected LMSI employees for employment to begin on December 1, Torrens had not filed an application or a resume with ITT. However, I find from LMSI's witness Morales' testimony that on October 28, LMSI gave a list of its Roosevelt Roads employees to ITT. Torrens' name was on that list.

On November 19, Joseph R. Howell, acting manager of the MOE Department, called Torrens to Howell's office. When Torrens arrived, Howell directed him to change the hours shown on Torrens' time and expense report to comply with figures supplied by Torrens' immediate supervisor. Torrens suggested that Howell check the time and expense report in question and see what was wrong. Torrens said he would change the report if Howell found it to be erroneous. Howell warned Torrens that he was insubordinate for not following his immediate supervisor's instruction and could be fired. Torrens said they should not go into that. Howell fired Torrens.

Torrens left Howell's office and went back to TRB-3 to remove his personal effects. On the way, Torrens telephoned SIU and reported his firing to Steve Ruiz, an SIU official. After Torrens was ready to leave TRB3, the ship's captain notified him that he was not fired and could continue working.

On November 25, Torrens was called to LMSI's human resources office at the Naval Base to fill out some layoff papers. With the help of a secretary, Torrens completed the necessary paper work. An exit form that Torrens signed showed that November 30 would be his last day of day of work. The secretary took the form to LMSI's Human Resources Director Morales for completion and his signature. When the secretary retrieved the form from Morales, he had written a large "N," meaning "no, next to "Eligible for Rehire." Morales' "N" meant that LMSI would never rehire Torrens either in Puerto Rico or anywhere else.

As of November 30, Torrens' title on LMSI's payroll was unlicensed engineer. However he worked as a chief engineer on the TRB-3. As of December 1, ITT employed Rafael Agosto-Lopez, whose title on LMSI's payroll was engineer utility person, as chief engineer on TRB-3. ITT did not hire Torrens' assistant Carlos Molinaris. Instead, Agosto-Lopez's assistant, as of December 1, was Jose Lopez-Mendez.[7]

Richard Rhinehart worked for LMSI and its predecessors, at the Roosevelt Roads Naval Base, from August 1988, until June 1996. He was a second officer on the USNS *Hugo,* which operated out of Roosevelt Roads. LMSI discharged Rhinehart on June 21. However, the unfair labor practice charge concerning Rhinehart's discharge was not included in the instant proceeding.

Rhinehart was a union activist. He encouraged the SIU to organize LMSI's MOE employees, attended the Board hearings regarding SIU's petition for a representation election and assisted in SIU's organizing campaign at Roosevelt Roads. At the hearing, he was a witness and a consultant for SIU. He acted as an SIU observer at the election in 1994. After SIU attained certification as the exclusive bargaining representative of the MOE employees, Rhinehart became SIU's main delegate for that bargaining unit. He continued as SIU's delegate until his discharge. As delegate, he presented grievances to LMSI. He also filed unfair labor practice charges with the Board, against his employer.

On Tuesday, June 11, Rhinehart was working onboard *Hugo*. The ship was under way. That day, Rhinehart had worked 16.5 hours and had entered that figure on his timesheet. On the same day, he received word that he would be paid for only 4.5 hours and should reduce the hours on his timesheet accordingly. Rhinehart made the change on the bottom part of the report.

On the following day, Joseph Howell, Manager of Underwater Range Services, which included MOE, called Rhinehart to his office and directed him to correct the top portion of his T and E report by changing 16.5 hours to 4.5 hours. Rhinehart complained that this problem with his time and expense report (referred to as a "T and E report" showed how LMSI was forcing employees to falsify their timesheets for payment.

Howell insisted that Rhinehart change the top portion of the report. Rhinehart refused on the ground that the log showed he worked 16.5 hours. He added that he had only changed the daily total because Howell had insisted that Rhinehart do so if he wanted to get paid.

Five days later, Rhinehart, as SIU delegate, filed a grievance for himself and six other employees, including Harry Wessel, alleging that LMSI was wrongfully refusing to pay them for the 16 hours they worked on June 11. At the time of the hearing before me, this grievance was pending.

The dispute underlying Rhinehart's refusal to change his T and E report, and the grievance, arose from LMSI's computation of overtime on his vessel, at sea, on June 11. Section 7.02 of the collective-bargaining agreement in effect on June 11

[7] Except as noted above, my findings of fact regarding Torrens' employment and his union activity are based upon his testimony, which was uncontradicted

covered such computations. SIU's position was that MOE employees, sailing on the *Hugo* or any other surface craft crewed by MOE employees, were entitled to pay from the moment the craft left its berth until it returned. LMSI's view was that the MOE employees were entitled to be paid only for hours actually on watch, when they were aboard a vessel at sea.

On June 21, Rhinehart went to LMSI's headquarters at Roosevelt Roads to attend a port committee meeting with Steve Ruiz. However, LMSI's Human Resources Manager Morales insisted on dealing with Rhinehart's T and E issue. Morales insisted that Rhinehart change his time and expense report, as directed on June 11. Rhinehart refused saying that he would not falsify his T and E reports anymore. Morales warned Rhinehart that if he refused to change his T and E report he would be fired. Morales asked Rhinehart if he understood that if he refused to change the report, he faced discharge. When Rhinehart said he understood, Morales fired him and asked an assistant for Rhinehart's check. The assistant brought the check to Morales, who promptly issued it to Rhinehart. Morales left his office and closed the door.

Rhinehart remained in Morales' office as Minerva Donato, an LMSI human resources representative filled out his exit papers. Morales opened the door to his office and prohibited Rhinehart from going anywhere, reminding him that he was "still on the clock." Morales threatened to call security and have Rhinehart arrested if he left the office. Morales called the MOE shop and asked Operations Coordinator Alexander De Jesus to come to the Human Resources office and escort Rhinehart back to his ship. Donato finished the form, gave it to Rhinehart for his signature, submitted it for Morales' signature, and then gave it to Rhinehart. Rhinehart turned in his passes and De Jesus escorted him to the *Hugo*.

The exit form, which Donato prepared and Morales signed, showed two reasons for Rhinehart's exit, "Labor Dispute" and "Termination." Rhinehart checked the box marked "Labor Dispute" before Morales signed the form. Donator checked the box for "Termination" before Morales signed the form. In the space marked "Involuntary Termination," Donato checked off "Violated Company Rules." In a space marked "Eligible for Rehire Y/N" there is an N with morales' initials next to it.[8]

The payroll list, which LMSI furnished to ITT on October 28, did not contain Rhinehart's name. Further, I find from the parties' stipulation that in November, at the time ITT had selected employees for employment by it on and after December 1, Rhinehart had not submitted either an application or a resume to ITT for its consideration. ITT did not hire Rhinehart on and after December 1.

Harry Wessel's employment in government services began in the Bahamas in 1972, when he worked for RCA. He remained with RCA in the Bahamas until its merger with GE in 1991. GE transferred Wessel to its Roosevelt Roads Naval Station operations on March 29, 1991. From July 14, 1991, until his last day of employment at the Naval Station, on November 30, when LMSI discharged him, Wessel was the Chief Engineer on USNS *Hugo*. During that same period, he was employed by GE's successors at Roosevelt Roads, Martin-Marietta, and last by LMSI. When Wessel began working on the *Hugo*, its captain was John Sokolski. At some point, Franklin Woods replaced Sokolski.

Before his employment as chief engineer, Wessel had worked as a deck hand, an oiler, and in both grades of assistant engineer. As chief engineer, Wessel was basically a chief mechanic. He was responsible for his ship's operational maintenance to ensure that it was seaworthy and safe for its personnel. Further, he was required to keep the ship's captain and its maintenance personnel informed of any problems, which might arise. Wessel worked with two marine technicians, who acted as assistant engineers.[9]

Harry Wessel actively supported SIU. In 1993, he was one of [the] temployees who approached SIU's port agent, Steve Ruiz about organizing the employees at Roosevelt Roads. When SIU began organizing the MOE employees, Wessel helped by distributing authorization cards to his fellow employees. He attended SIU meetings. Wessel testified at the hearing, which the Regional Director for Region 24 conducted on SIU's petition for a representation election in Case 24–RC–7569.

SIU filed its petition on June 15, 1993. The Regional Director issued her Decision and Direction of Election on July 12, 1994. The Regional Director's decision authorized chief engineers to vote challenged ballots in light of LM's unresolved contention that they were supervisors, within the meaning of Section 2(11) of the Act. Wessel voted a challenged ballot.

On August 24, 1994, the Regional Director certified SIU as the bargaining agent for a unit of LMSI's MOE employees. In August 1995, LMSI and SIU reached a collective-bargaining agreement but did not agree on the unit placement of chief engineers and chief officers. However, LMSI and SIU agreed that the latter would seek a unit clarification from the Board. On October 13, 1995, SIU filed a petition seeking clarification of the unit placement of the disputed classifications. The Regional Director held a hearing on the petition on January 23 and 24, and on February 8, 12, and 28.

Prior to the Regional Director's determination that chief engineers were unit employees, Wessel disputed his supervisors' attempts to treat him as a supervisor. In the first week of August 1995, Wessel asked the MOE manager, De Jesus, for a sea time letter which Wessel needed to renew his chief engineer's license through the U.S. Coast Guard. De Jesus advised Wessel that Human Relations Manager Morales was the only person who could provide that letter to Wessel. De Jesus said he would contact Morales. Wessel's license was scheduled to expire in October 1995. Hearing nothing about his letter, Wessel asked De Jesus about it during the last week of August 1995. Wessel also suggested that he would seek help from the SIU in obtaining the letter. Wessel asked Steve Ruiz, SIU's port agent, to get in touch with Morales. In a memorandum

[8] My findings of fact regarding Rhinehart's employment by LMSI and his union activity are based upon his testimony, which was uncontradicted.

[9] My findings regarding Wessel's duties and the marine technicians function are based upon his uncontradicted testimony and the Regional Director's findings in her Decision and Clarification of Bargaining Unit in Case 24–UC–159.

dated September 25, 1995, Morales advised Ruiz that: "Chief Engineer is not included in the bargaining unit."

On September 25, 1995, Captain Harry Woods, master of the *Hugo,* ordered Wessel to initial some weekly T and E reports for two bargaining unit employees. Woods said he was acting at De Jesus' direction. Wessel went to De Jesus, challenged the latter's order and requested SIU representation. De Jesus rejected Wessel's request, saying that Wessel was not a member of the bargaining unit. Wessel returned to *Hugo* and initialed the T and E reports for the two employees.

On October 16, 1995, Wessel wrote a memo to De Jesus objecting to the order requiring Wessel to initial T and E reports. Wessel also told De Jesus that the order requiring Wessel to initial T and E reports was an attempt to "create a paper trail" to support LMSI's claim in the pending clarification proceeding that chief engineers were supervisors.

In October 1995, Richard Rhinehart, as SIU delegate, sought to present a grievance to LMSI on Wessel's behalf regarding the initialing of T and E reports. In a memorandum to Rhinehart, dated October 26, 1995, De Jesus stated that until the unit clarification issues were decided, LMSI would not recognize any grievances filed by SIU on behalf of either first officers or chief engineers.

On October 31, 1995, De Jesus issued a disciplinary memo to Wessel warning him that his refusal to initial T and E reports as required under the job description for chief engineers would expose Wessel to "disciplinary action." On that date, Wessel refused to sign a form to have his signature approved for signing such reports. Wessel received a further disciplinary memo from De Jesus on November 13, 1995, for refusing to initial T and E reports for subordinate employees.

On December 15, 1995, Wessel filed a charge in Case 24–CA–7327, alleging that LMSI had violated Section 8(a)(1) of the Act on October 31, 1995, by denying him union representation during a disciplinary interview, and on November 13, 1995, by threatening employees with discipline if they insisted on union representation during a disciplinary interview. Thereafter, on May 30, 1997, the Regional Director issued a consolidated complaint including Case 24–CA–7327, which did not include Wessel's allegations. Instead, the complaint alleged that LM and LMSI had violated Section 8(a)(3) and (1) of the Act by unilaterally imposing supervisory duties on Wessel because of his union activity. LM and LMSI issued an answer to this complaint denying these allegations. These allegations were among those remedied in the settlement referred to above at p.2, in which LM and LMSI agreed to expunge from all records the warning issued to Wessel on November 13, 1995.

Wessel received a subpoena to testify at a resumption of the clarification proceeding on February 29. On February 26 or 27, Wessel showed the subpoena to De Jesus, who telephoned Human Resources Manager Morales to advise him of the subpoena. Wessel joined the conversation on a third telephone. In the course of the discussion, Morales warned that Wessel would be fired if he attended the hearing. Wessel did not testify at the clarification hearing.

In October, Wessel attended a meeting at the MOE Building. Also present were Vice-President Prisby of LM, Human Resources Manager Jose Morales, Operations Coordinator Alexander De Jesus, and Underwater Range Services Manager Joseph Howell. The purpose of the meeting was to clarify the T and E report problems and resulting complaints, which Prisby had received from employees. The complaints were that employees, who wrote disagreements with figures in the reports, had received threats of discharge. At the meeting, Prisby sympathized with the employees and voiced approval of that practice. Wessel responded that it was ironic that LMSI had fired Rhinehart in June for doing that very thing. During this meeting, Prisby called Wessel a rabble-rouser and a troublemaker.

During the first week of November, Wessel attend a meeting at the MOE building to introduce the ITT personnel to MOE. An ITT representative[10] told the employees that ITT was working on a benefit package to be made available to those whom ITT would hire to work under its contract with the Navy. The speaker assured the employees their boat operations would continue without interruption during the transition period.

Following the meeting, Wessel and his ship, *Hugo,* put to sea for a week or a week and a half. When the cruise ended, Wessel learned from Captain Woods that there was list of personnel to be interviewed by ITT, on the MOE bulletin board and Wessel's name was not on it. Wessel went to the bulletin board and confirmed Woods' report. Wessel did not file an application for employment by ITT prior to December 1.

Wessel asked De Jesus why his name did not appear on the interview list. De Jesus told Wessel to ask Minerva Donato, at LMSI's human resources office. Donato sent Wessel to ITT's temporary office in the Mark 30 Building for an interview or to find out why he was not on the list.

Wessel went to the Mark 30 Building and encountered a woman named Connie. He identified himself as Harry Wessel, Chief Engineer of the *Hugo,* and said his name was not on the interview list. He explained that he had a heavy schedule for the rest of November and wanted to know if he would be interviewed and, if so, when. Connie went to her office, looked through a stack of papers, went to another office, spoke to someone and returned to tell Wessel that his name was not familiar. Connie told him to go back to Donato, as a supplementary employee list was being made up.

Wessel returned to the MOE building, where he encountered Bob Romine, maintenance coordinator, who stated that at Joe Howell's request he had run off an employee list and had given it to Howell. Wessel also called Donato, who said that as they were speaking, she was making up the supplementary list. Wessel thanked her and hung up. He returned to *Hugo* to prepare the ship for departure.

Hugo returned to its base on November 26. As Captain Woods was leaving the ship, he came upon Wessel and told him "Harry, your not going to be rehired." Wessel packed up all his clothes, except for the clothes he would need for the last operation before November 30.

On December 2, on instructions from LMSI's Human Resources Manager Jose Morales, Wessel reported to the Mark 30

[10] On direct examination, Wessel testified that ITT's speaker at this meeting was Mr. Bligh, who is John F. Bligh. However, on cross-examination, after seeing Bligh at the hearing, Wessel changed his testimony and admitted that he could not identify the speaker.

Building to receive a separation form. The form gave "lack of work" as the reason for Wessel's exit from LMSI's employ and gave November 30 as his last workday. Wessel asked why there was an N in the space captioned: Eligible for Rehire. Morales answered: "[B]ecause we don't want you." Wessel asked again and Morales came back with essentially the same answer.

Morales concluded his processing of Wessel by scraping the base identification sticker of the bumper of Wessel's truck. When Wessel protested, Morales said he was going to do it anyway inasmuch as LMSI had issued it to Wessel.

ITT employed Wessel's assistant, Carlos Figueroa, as Chief Engineer on the *Hugo* after November 30. Figueroa occupied that same position at the time of hearing in these cases.[11]

ITT sent David Graham to Roosevelt Roads in November to assist in the phase-in leading up to December 1 and to become manager of MOE. Ultimately Graham decided to help in the changeover and return to his job with ITT in Hawaii. However, before his arrival at Roosevelt Roads, Graham had participated in the preparation of ITT's bid submitted to the Navy in competition with LM. Graham expected to employ fewer personnel than LM had employed to perform the contract with the Navy. ITT did not refine its intent to specific numbers. The Navy required a crew of nine each for *Hugo* and *Hunter*. However, the Navy did not specify the number of employees for MOE. As of November 30, LMSI had a total of 272 employees at its Roosevelt Roads operation. ITT hired approximately 180 of that number. MOE had approximately 42 or 46 employees under LMSI. Of that group, ITT hired 21 or 22.[12]

On October 28, LMSI's Human Resources Manager Jose Morales sent a list of LMSI's Roosevelt Roads employees to Connie Accini of ITT's Human Resources Department. Minerva Donato prepared the list from LMSI's payroll record on Morales' instructions. Donato prepared the list, showing the hourly wages of rank-and-file employees, and omitting the rates of pay for managers and supervisors referred to as "exempt employees" in her testimony. The names of employees Wessel and Torrens appeared on the list. Rhinehart's name was absent, as LMSI had discharged him in June.

In a faxed message to Morales dated October 28, ITT's Connie Accini announced that ITT would announce the dates, times and locations of informational meetings with LMSI employees and that ITT would place an ad in a local newspaper, *El Nuevo Dia* to advise employees of the meetings. The memo also requested that LMSI post the attached notice. Finally, Accini wrote that she was looking forward to meeting with Morales at his office at 8 a.m., on the coming Friday. The "coming Friday; was November 1.

The meeting at Morales' office on Friday, November 1, was for familiarization between Accini, and Morales and Donato. Thereafter, during the transition, there were additional informal meetings between Morales, and representatives of ITT, at which information regarding W-2 forms, the facilities, housing and similar topics were discussed. Donato and Morales helped ITT's transition team find a location on the naval base for interviewing employees. ITT's human relations representatives made their own arrangements with individual LMSI employees for interviews. Aside from the list taken from LMSI's payroll, the record shows no other transmission of information from LMSI to ITT regarding MOE employees. Neither Donato nor Morales gave any information to ITT regarding Torrens, Rhinehart, or Wessel other than the payroll record. ITT did not ask Donato or Morales any questions regarding the union activity of the same three employees. Nor did anyone from LMSI ask Donato or Morales to give any information to ITT about the union activity of Torrens, Rhinehart, or Wessel.[13]

ITT assigned Graham the task of hiring for the MOE operation. He arrived in Puerto Rico in early or mid-November and had completed his assignment in time to return to Hawaii for Thanksgiving. Graham received a list of the positions to be filled together with a stack of resumes and applications. Graham did not consider for employment by ITT anyone who did not file an application. He matched names to positions and interviewed all the applicants. He found more applicants than there were job openings in MOE. After he had matched names to positions, he gave the prospective employees' applications to ITT human resources personnel, who had come to Puerto Rico to assist in the transition. The human resources personnel would invite the applicants to be interviewed on ITT policies and benefits and to sign an offer letter. ITT also posted lists of selected applicants and their scheduled interviews. Graham selected the employee for each MOE slot, including bargaining unit and non-bargaining unit positions. He recruited approximately 200 employees.[14] Graham did not consider Wessel, Rhinehart, or Torrens for employment by ITT.

Graham received no input from LMSI supervisors in the course of recruiting for ITT at Roosevelt Roads.[15] No one from LMSI told Graham not to hire certain applicants. However, after he had selected the employees, Graham took the list to Alexander De Jesus to verify that the selected employees were

[11] My findings of fact regarding Wessel's employment at LMSI and his union activity are based upon his uncontradicted testimony.

[12] My findings regarding Graham's activity at Roosevelt Roads during the transition period are based upon his uncontradicted testimony. My findings regarding the numbers of employees employed by LM and the numbers hired by ITT are based upon Donato's uncontradicted testimony.

[13] My findings regarding meetings between ITT personnel and Morales or Donato are based upon Morales and Donato's uncontradicted testimony.

[14] My findings of fact regarding Graham's recruiting of employees for ITT at Roosevelt Roads, are based upon his testimony.

[15] In a letter to SIU's Steve Ruiz, ITT's John Bligh explained that the selection of applicants for employment by ITT at Roosevelt Roads "was based upon the supervisors' evaluation of the employees performance, attitude and ability to do the job." Bligh did not testify in these proceedings. On cross-examination, Graham attempted to explain that Bligh was referring to ITT supervisors, including Graham. However, on further cross-examination, Graham, testifying in a forthright manner, asserted that he had no input from LM supervisors, nor from anyone else, when he selected applicants for ITT. He firmly insisted that he relied only upon the employees' applications. I have credited Graham's testimony regarding his role in the selection of the MOE employees for ITT.

qualified for their respective positions and capable of performing more than one job.[16]

b. Analysis and conclusions

According to the consolidated complaint, and the General Counsel's posthearing brief during the period between the last week in October and December 1, LMSI blacklisted the three employees or otherwise caused or attempted to cause ITT to refuse to hire them because of their union activity and thereby violated Section 8(a)(3) and (1) of the Act. The General Counsel's brief focuses on the possibility that LMSI's supervisors alerted ITT to the union activity of Torrens, Rhinehart, and Wessel and thus blacklisted them. In his brief, the General Counsel contends that LMSI violated Section 8(a)(3) and (1) of the Act by providing ITT with information regarding the alleged discriminatees' involvement with SIU, the representation election, the clarification proceeding, and efforts to vindicate the collective-bargaining agreement using the grievance procedure. Further, the General Counsel argues that ITT heeded that warning and refused to hire Torrens, Rhinehart and Wessel because of their union activity and thereby violated Section 8(a)(3) and (1) of the Act.

The Board has recognized that an employer's effort to blacklist an employee because of union activity or other activity protected by Section 7 of the Act violates Section 8(a)(1) of the Act. *Truck and Trailer Service,* 239 NLRB 967, 970 (1978). Here, I find the record does not show any effort by LMSI to provide any information regarding the union sentiment or union activity of the three alleged discriminates during the November transition period. The payroll list which Donato and Morales prepared and delivered to ITT had no information regarding the union activity or union sentiment of the employees listed. There was no showing that ITT's Graham or any other ITT recruiter received any such information from LMSI management about any of the applicants for employment by ITT. Accordingly, I find that the General Counsel has not shown that LMSI blacklisted employees or otherwise attempted to cause ITT to refuse to hire LMSI employees because of their union activity or pro-union sentiment. I shall recommend dismissal of the allegations that LMSI engaged in such conduct

Under Board policy, where the record shows that an employer's hostility toward union activity or other activity protected by the Act was a substantial or motivating factor in a decision to refuse to hire or to take other adverse action against an employee, the refusal to hire or other adverse action will be found unlawful, unless the employer demonstrates, as an affirmative defense, that it would have refused to hire, or taken the alleged adverse action against the employee even in the absence of the protected activity. *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 402–403 (1983), affg. *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982); *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996). Where it is shown that the business reason or reasons advanced by the employer for the refusal to hire, or other adverse action, were pretextual—that is, that the reason or reasons either did not exist or were not in fact relied upon—it necessarily follows that the employer has not met its burden and the inquiry is logically at an end. *Wright Line,* supra at 1084.

I find that the General Counsel has failed to show that Torrens', Rhinehart's, or Wessel's union activity as LMSI employees was a substantial or motivating factor in ITT's failure to select any of these three MOE employees for its Surface Craft Department, during the transition period leading up to December 1. Certainly, LMSI's management was aware that these three employees were leading SIU supporters. However, there was no showing that ITT's David Graham, who selected the employees for ITT's Surface Craft Department, knew anything about Torrens', Rhinehart's, or Wessel's union activity or pro-union sentiment, when he made his choices. Graham had no information from LMSI about these employees, when he went over the applications presented to him by ITT personnel.

When Graham selected employees for ITT in November, he had no opportunity to consider the three alleged discriminates for employment. None of the three bothered to file an application for employment by ITT. Graham did not look at the payroll list that LMSI had furnished to ITT at the end of October. He relied exclusively upon applications. Thus, there was no showing that he even saw the names of the three in November. Nor was there any showing that ITT's decision to employ a smaller employee complement than LMSI had, to administer its contract with the Navy was motivated by a design to get rid of SIU supporters.

In sum, I am not persuaded that the General Counsel has shown that the three employees' support for SIU motivated ITT's selection of employees in November for its Surface Craft Department operations beginning December 1. Accordingly, I find that the General Counsel has failed to show by a preponderance of the evidence that ITT violated Section 8(a)(3) and (1) of the Act when it failed to hire Torrens, Rhinehart, and Wessel in November for employment in its Roosevelt Roads operations.

2. February 1997

a. The facts

In January 1997, ITT began to seek referrals from SIU to fill positions in the Surface Craft Department. On January 14, 1997, Steve Ruiz and Jose Morrero, representing SIU, met with Surface Craft Department Manager Cabral and Lisa Ramsey, an ITT management representative. The SIU representatives came to this meeting to find out why ITT was not hiring former LMSI employees, including Rhinehart, Wessel, and Torrens. Ruiz and Morrero asked if ITT would hire Rhinehart. Cabral replied that he had no problem hiring Rhinehart, who, he said was a good boat handler. Cabral also said he had a problem with Torrens because of excessive absences from work. Ruiz asked how Cabral knew about Torrens' absences. Cabral said he had previously worked with Torrens. Ruiz suggested that

[16] According to De Jesus, Graham did not discuss anything about employees with him. However, this denial came in quick response to a leading question on direct examination. However, Graham testified in candid manner regarding his consultation with De Jesus. As Graham impressed me as a frank witness, I have credited him rather than De Jesus.

perhaps Torrens had changed. Cabral said he would think about Torrens.[17]

In January 1997, SIU invited Torrens to come to its hall with his resume and fill out an application for a position at ITT's Roosevelt Roads operation. Torrens complied with SIU's instructions. In February, SIU directed Torrens to report to the main gate at Roosevelt Roads at 7:30 one morning, where Minerva Donato would meet him and conduct him to an interview by ITT. Torrens reported as instructed.

Surface Craft Department Manager Cabral interviewed Torrens. At the outset, Cabral asked Torrens for his license and his resume. Cabral asked Torrens a few questions. Among them, Cabral asked Torrens how he could help ITT. Torrens replied that he could help ITT by helping the employees to do a better job for the company. After this interview, Torrens never heard from ITT again.[18]

On February 6, 1997, Donato sent an employment requisition to SIU announcing an opening for an unlicensed engineer. LMSI had employed Torrens as an unlicensed engineer.

In February 1997, Ruiz advised Rhinehart that ITT was hiring for Rhinehart's old position. I find from Ruiz's testimony that at this time, he was seeking a second mate's position for Rhinehart. Ruiz told Rhinehart to fill out an application for employment at ITT and get it to Ruiz. Rhinehart followed Ruiz's instructions. On February 10, 1997, Rhinehart and several other applicants, including Torrens, reported to Gate #1 at Roosevelt Roads.

Cabral interviewed Rhinehart and asked him some questions. Cabral said he knew where Rhinehart had worked last, how long he had worked there and why he had left. Cabral asked what Rhinehart had liked about his last job. Rhinehart replied that he had liked the men he worked with. Cabral asked him what he did not like about his last job. Rhinehart answered that he did not like the way management had lied to the employees and cheated them out of their pay.

Cabral asked what Rhinehart would do if Cabral told him that things have not changed? Rhinehart answered that he wanted to work and get paid, and that he would get along with his fellow employees as he had in the past. Rhinehart asked Cabral what positions were opened. Cabral answered that he had two deck positions, engine positions, and two mate slots. The interview concluded after about 10 minutes. Following this interview, ITT never called Rhinehart back or otherwise contacted him about employment.

Later in February 1997, Ruiz invited Rhinehart to sit with SIU's side during contract negotiations with ITT. On February 26, 1997, Rhinehart sat with Ruiz and Jose Morero at the bargaining table. ITT's negotiators were Employee Relations Manager John F. Bligh, Lisa Ramsey, Minerva Donato,[19] and Cabral. When the SIU group came into the meeting, Bligh challenged Rhinehart's entitlement to represent the bargaining unit, as he was no longer a unit employee. Bligh waived a finger close to Rhinehart's face, asked what he was doing there and threatened to pull out of the negotiations. Ruiz replied that SIU wanted Rhinehart present because of his expertise on the contract project. Bligh withdrew his objection and negotiations proceeded peacefully.

On the following day, Ruiz approached Cabral about getting Rhinehart into a second mate's job. Cabral answered that he didn't "get a warm fuzzy feeling" from Rhinehart. Ruiz pressed Cabral for a further explanation. Cabral replied: "Right now, that is the only answer that I am going to give you, because Richard [Rhinehart] is sitting there."

SIU filed a grievance regarding Rhinehart, complaining that ITT was discriminating against him. In addition, Ruiz asked for an explanation from ITT for its treatment of Rhinehart. In a letter dated March 11, 1997, ITT refused to give any reason for not hiring him. Instead, Bligh, the letter's author, simply denied that ITT had discriminated against Rhinehart.

I find from Donato's testimony that after December 1, ITT hired a second mate in the mainland United States for work at Roosevelt Roads, without going through SIU or offering the job to Rhinehart.

There was no showing that SIU referred Wessel for a position at ITT after December 1. Nor was there any showing that Wessel made any effort to find employment at ITT's Roosevelt Roads operations. Accordingly, I shall recommend dismissal of the complaint allegations regarding ITT's failure to consider Wessel for employment or hire him in February 1997.

b. Analysis and conclusions

The General Counsel contends that ITT violated Section 8(a)(3) and (1) in February 1997, by refusing to consider for employment or hire Torrens and Rhinehart. ITT denied these allegations and offered economic reasons for refusing to hire Torrens and Rhinehart. Applying the Board's *Wright Line* test to the evidence regarding ITT's conduct toward Torrens and Rhinehart in February 1997, I find merit in the General Counsel's contentions.

The record shows that Minerva Donato was part of LMSI's management when Torrens and Rhinehart were actively supporting SIU. She was aware of the representation election and the clarification proceedings. I also find it likely that as a LMSI senior human resources representative in 1996, she was aware of the warning issued to Torrens on February 1 and the circumstances surrounding Rhinehart's discharge on June 21. I find that her close association with Jose Morales, who was LMSI's Director of Human Resources at Roosevelt Roads throughout 1996, provided her with knowledge of Torrens and Rhinehart's support for SIU's opposition to LMSI's policies regarding the T and E reports and wages for MOE employees while at sea. Thus, when Donato became a member of ITT's

[17] My findings regarding the meeting between SIU representatives and ITT's representatives are based upon the testimony of Ruiz and Ramsey. Ruiz testified that he believed this meeting occurred on January 13. Ramsey testified that her notes showed that it took place on January 14. As she seemed more certain about the date than Ruiz did, I credited Ramsey in this regard.

[18] My findings regarding Torrens' referral to ITT and his encounter with Cabral are based upon his uncontradicted testimony. Cabral did not testify.

[19] Since December 1, Donato has been ITT's human resources administrator and an admitted supervisor within the meaning of Sec. 2(11) of the Act.

management on December 1, she knew of Torrens' and Rhinehart's pro-SIU activities and sentiment.

The record also shows the strong likelihood that when Cabral became ITT's manager of MOE in December, he was aware of Torrens' and Rhinehart's reputations as active and outspoken SIU supporters. Prior to his employment by ITT on December 1, Cabral had worked for LMSI's predecessor, GE and was familiar with Morales. I find from De Jesus' testimony, that for some time prior to December 1, Cabral visited Morales in the human resources office. During these visits, Cabral had ample opportunity to learn from Morales that Rhinehart had been SIU's chief delegate until discharged on June 21, and that the discharge had something to do with a dispute between SIU and LMSI over a collective-bargaining issue. Morales would be likely to brief ITT's incoming MOE Manager on Torrens' activity as Rhinehart's successor as SIU's chief delegate.

Another supervisor, Franklin Woods, Captain of *Hugo*, was well acquainted with Torrens' SIU activity. Indeed, Woods assumed that Torrens was engaged in union activity on October 4, when he harshly ordered Torrens to leave *Hugo*. On December 1, Woods became part of ITT's management at Roosevelt Roads, and continued as *Hugo's* captain. He brought his knowledge and hostility with him.

The Board has recognized that: "Activities, statements, and knowledge of a supervisor are properly attributable to the employer." *Pinkerton's Inc.,* 295 NLRB 538 (1989). Here, I find that when SIU referred Rhinehart and Torrens for employment in February 1997, ITT was well aware of their union activity and sentiments.

Under Board policy, LMSI's presettlement conduct can be used to shed light on ITT's refusal to hire Torrens and Rhinehart in February 1997. *Special Mine Services,* 308 NLRB 711, 720 (1992). There is ample evidence that LMSI's management was hostile to employees who engaged in activity on behalf of SIU. The settlement in cases 24–CA–7303, 7327, 7404, and 7546 sought to remedy allegations that LMSI "issued warnings, assigned supervisory duties, harass[ed] or otherwise discriminate[d]" against employees because they supported SIU. The record shows that De Jesus issued one of those warnings to Torrens on February 1. Minerva Donato as a member of LMSI's management was no doubt aware of this conduct, as an assistant manager of its human resources. Given her position with LMSI, Donato may have assisted in formulating the conduct recited in the settlement agreement. ITT hired Cabral as its MOE manager in mid-November. His weekly visits with Human Relations Manager Morales provided opportunity for the incoming MOE manager to learn of LMSI's hostility toward Torrens and Rhinehart, and share that sentiment.

The hostility toward SIU activists, which surfaced under LMSI's management at Roosevelt Roads, appeared again under ITT's management. Thus, on February 26, 1997, John Bligh, ITT's employee relations manager, found Rhinehart's presence with the SIU at negotiations objectionable. On the following day, when Ruiz raised the possibility of ITT hiring Rhinehart. Cabral replied that he did not get a warm fuzzy feeling from Rhinehart. Cabral's antiunion sentiment surfaced in May 1997, when he threatened an unspecified reprisal against the employee or employees who had posted SIU signs near the Naval station, asserting that ITT was unfair. In this incident, Cabral revealed that he was willing to impose unlawful economic punishment upon SIU supporters. Finally, ITT's resort to the mainland United States to hire a second mate rather than offer the position to Rhinehart is further evidence of the union animus which ITT's management harbored when he sought his former position in February 1997. In sum, I find that the General Counsel has shown that Torrens' and Rhinehart's active support of SIU was a motivating factor in ITT's refusal to hire them on February 10, 1997.

I find ITT's proffered defense inadequate to rebut the General Counsel's evidence of unlawful motive. In its posthearing brief, ITT suggests that Torrens and Rhinehart were not qualified for employment by ITT. I note that Cabral and ITT did not raise qualifications or the lack thereof as a reason for rejecting either Torrens or Rhinehart. Indeed, both Cabral and Bligh refused to give any reason for Cabral's refusal to hire Rhinehart. All Cabral would say was that Rhinehart was a good boat handler, but did not give him a "warm fuzzy feeling." Thus, ITT's newly expressed concern about qualifications is an afterthought, which played no role in Cabral's decision to refuse employment to Torrens and Rhinehart.

In any event, the record shows that Rhinehart and Torrens were amply qualified. Thus, the record shows that LMSI, and its predecessors employed Torrens for 17 years and that he was an unlicensed engineer serving as the chief engineer on a torpedo retrieval craft. Rhinehart was the second mate on *Hugo.* LMSI and its predecessors, RCA and GE, employed Rhinehart for almost 18 years. In sum, the record shows that Torrens and Rhinehart were well experienced in their respective jobs at LMSI.

ITT raises Torrens' absences from work as the reason for rejecting him for employment in February 1997. As found above, on February 1, LMSI issued a second disciplinary warning to Torrens for excessive absences. However, under the settlement referred to earlier, LMSI agreed to expunge that warning from Torrens' record. Further, ITT did not introduce any other evidence regarding Torrens' absences during his employment at LMSI. Nor did Cabral testify. Thus, ITT did not substantiate its claim that Torrens was excessively absent from work prior to the arrival of ITT at Roosevelt Roads. Finally, I find from Ruiz's testimony that ITT had retained LMSI employees Angel Acosta and Victor Guttierez, notwithstanding each had received a written warning for absenteeism from LMSI. Thus, far from assisting ITT's defense, the evidence regarding ITT treatment of absenteeism, strongly suggests that Torrens was the victim of disparate treatment at Cabral's hands.

I find from the foregoing that ITT's explanation of its refusal to hire Torrens and Rhinehart on February 10, 1997, was wholly pretextual. I also find, therefore, that ITT, by its refusal to hire these two employees because they supported SIU, violated Section 8(a)(3) and (1) of the Act. *Pepsi Cola Bottling Co.,* 301 NLRB 1008, 1030 (1991).

CONCLUSIONS OF LAW

1. Lockheed Martin Services, Inc. and ITT Federal Services Corporation are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Lockheed Martin Services, Inc. has not violated Section 8(a)(3) and (1) of the Act by blacklisting or attempting to cause or causing ITT Federal Services Corporation (ITT) to discriminate against employees Peter Torrens, Harry Wessel, and Richard Rhinehart by failing or refusing to hire these employees because they supported SIU or any other labor organization.

4. ITT did not violate Section 8(a)(3) and (1) of the Act in November 1996 by refusing to consider or refusing to employ employees Peter Torrens, Harry Wessel, and Richard Rhinehart

5. By failing and refusing to hire employees Peter Torrens and Richard Rhinehart on February 10, 1997, because of their union activity, ITT violated Section 8(a)(3) and (1) of the Act.

6. ITT did not violate Section 8(3) and (1) of the Act by failing and refusing to consider or hire employee Harry Wessel on or about February 10, 1997.

7. ITT violated Section 8(a)(1) of the Act in May 1997, by threatening an employee with unspecified reprisals for engaging in union activity.

REMEDY

Having found that the Respondent ITT has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, ITT, having discriminatorily refused to employ employees Peter Torrens and Richard Rhinehart, must offer them employment at its Roosevelt Roads operation and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the refusals to hire to date of proper offer of employment, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, ITT Federal Services Corporation, Roosevelt Roads, Ceiba, Puerto Rico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with reprisals because they engage in activities on behalf of Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

(b) Refusing to hire or otherwise discriminating against employees for supporting Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Peter Torrens and Richard Rhinehart employment in the positions for which they would have been hired on February 10, 1997, but for ITT's unlawful discrimination or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Peter Torrens and Richard Rhinehart whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Place either or both discriminatees for whom ITT has no immediate position on a preferential hiring list and offer them employment as vacancies occur in the positions they sought in February 1997, or in substantially equivalent positions.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Roosevelt Roads, Puerto Rico facility copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by ITT's authorized representative, shall be posted by ITT immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by ITT to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, ITT has gone out of business or closed the facility involved in these proceedings, ITT shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by ITT at Roosevelt Roads, Puerto Rico at any time since February 10, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that ITT has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgement Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with reprisals because they engage in activities on behalf of Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

WE WILL NOT refuse to hire or otherwise discriminate against employees for supporting Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, a/w Seafarers International Union of North America, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Peter Torrens and Richard Rhinehart employment in the positions for which they would have been hired on February 10, 1997, or, if those positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Peter Torrens and Richard Rhinehart whole for any loss of earnings and other benefits suffered as a result of our refusal to hire them, less any net interim earnings, plus interest.

WE WILL place Peter Torrens or Richard Rhinehart or both of them on a preferential hiring list if we do not have an immediate position for either of them or for both of them, and offer them employment as vacancies occur in the positions they sought in February 1997, or in substantially equivalent positions.

ITT FEDERAL SERVICES CORPORATION